

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

DANNY K. SHORT,

Debtor.

No. 98-23192
Chapter 7

FCC NATIONAL BANK
d/b/a FIRST CARD,

Plaintiff,

vs.

Adv. Pro. No. 99-2010

DANNY K. SHORT,

Defendant.

M E M O R A N D U M

APPEARANCES :

R.O. SMITH, Esq.
Post Office Box 366
Erwin, Tennessee 37650
*Attorney for FCC National Bank
d/b/a First Card*

WILLIAM A. ZIERER, Esq.
Post Office Box 1276
Morristown, Tennessee 37816-1276
Attorney for Danny K. Short

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is before the court on the motion for summary judgment filed by the plaintiff, FCC National Bank d/b/a First Card ("First Card") on July 8, 1999. The motion requests a nondischargeability determination and judgment for cash advances obtained by the debtor within the sixty-day presumptive period provided by 11 U.S.C. § 523(a)(2)(C). For the following reasons, the motion will be granted in part, the court concluding that cash advances aggregating more than \$1,075.00 obtained by the debtor within sixty days preceding the bankruptcy filing are excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A) and (C). However, because there is insufficient evidence concerning the precise amount of the advances, the court is unable to award a judgment against the debtor in favor of First Card in any particular amount. This is a core proceeding. See 28 U.S.C. § 157(b)(2)(I).

The debtor filed a petition under chapter 7 commencing the underlying bankruptcy case on December 18, 1998. The complaint initiating this adversary proceeding alleges that the debtor was indebted to First Card in the amount of \$5,671.89 on a credit card account and seeks a determination of nondischargeability under 11 U.S.C. § 523(a)(2)(A). First Card also alleges that the debtor "made cash withdrawals totaling \$4,500.00 during the 60 day period prior to filing bankruptcy." In his answer, the

debtor "admits making charges or cash advances during the sixty day period prior to filing bankruptcy, but is uncertain of the amount, and leaves plaintiff to its proofs." The debtor, as an affirmative defense, avers that he "had the subjective intention to repay all cash advances or charges taken within 60 days of filing his bankruptcy petition"

Fed. R. Civ. P. 56, as incorporated by Fed. R. Bankr. P. 7056, mandates the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment, the inference to be drawn from the underlying facts contained in the record must be viewed in a light most favorable to the party opposing the motion. See *Schilling v. Jackson Oil Co. (In re Transport Assoc., Inc.)*, 171 B.R. 232, 234 (Bankr. W.D. Ky. 1994)(citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986)). See also *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989). "[A]n adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but ... by affidavits or ... otherwise ..., must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does

not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e). See *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1133 (6th Cir. 1986).

By order entered May 5, 1999, the trial of this matter was set for August 11, 1999. That order required that dispositive motions be filed by July 8, 1999, and that "[r]esponses must be filed within seven days thereafter." E.D. Tenn. LBR. 7007-1 additionally provides that the "failure to respond shall be construed by the court to mean that the respondent does not oppose the relief requested by the motion." No response to the motion has been filed.

11 U.S.C. § 523(a)(2)(C) provides that "cash advances aggregating more than \$1,075.00 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 60 days before the order for relief ... are presumed to be nondischargeable." The extension of credit by virtue of a credit card is an "open end credit plan" under the Consumer Credit Protection Act. *Bank One Columbus, N.A. v. Schad (In re Kountry Korner Store)*, 221 B.R. 265, 269 (Bankr. N.D. Okla. 1998)(citing 15 U.S.C. § 1601, *et seq.*). "Once a creditor has established the applicability of the presumption, 'the burden of proof in applying § 523(a)(2)(A) shifts to the

debtor, and the debtor must then overcome the presumption that the money was obtained by false pretenses, a false representation, or actual fraud.'" *AT&T Universal Card Serv. Corp. v. Acker (In re Acker)*, 207 B.R. 12, 16 (Bankr. M.D. Fla. 1997)(quoting *ITT Financial Serv., Inc. v. Claar (In re Claar)*, 72 B.R. 319, 322 (Bankr. M.D. Fla. 1987)).

First Card having established its *prima facie* case by virtue of § 523(a)(2)(C)'s presumption, the debtor cannot simply rest on his answer. In light of the debtor's failure to respond to the motion for summary judgment, the debtor's admission that cash advances were taken on his credit card account within the sixty-day presumptive period, and the nondischargeability presumption of § 523(a)(2)(C), summary judgment in favor of First Card on the issue of the dischargeability of the cash advances is appropriate.

Nonetheless, the court is unable to enter judgment against the debtor in a specified amount as requested in the complaint. First Card's motion for summary judgment was not accompanied by an affidavit establishing the amount of the cash advances made within sixty days preceding the debtor's bankruptcy filing. The exhibit attached to the complaint lacks sufficient information to establish the amount. The interrogatories which First Card propounded to the debtor does contain an exhibit which appears

to reflect that the debtor took a \$4,500.00 cash advance in December 1998. However, the exhibit does not constitute evidence which the court may consider because it is not authenticated by an affidavit or otherwise. See *Harris v. Beneficial Oklahoma, Inc. (In re Harris)*, 209 B.R. 990, 996 (B.A.P. 10th Cir. 1997)(it is necessary for documents which are not a part of the record to be attached to an affidavit and authenticated therein).

Based on the foregoing, the court will enter an order in accordance with this memorandum opinion granting summary judgment to First Card on the issue of the nondischargeability of the cash advances aggregating more than \$1,075.00 taken by the debtor on the credit card account within sixty days preceding December 18, 1998. To the extent First Card is seeking judgment against the debtor for a particular amount, the motion for summary judgment will be denied.

FILED: July 30, 1999

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE